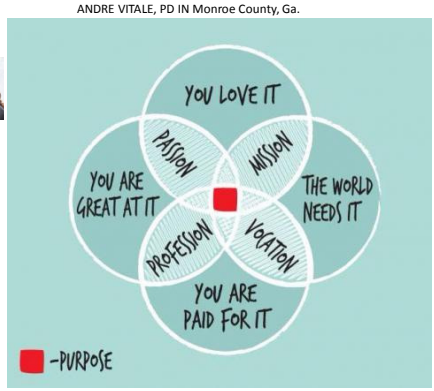
ANDRE VITALE, PD IN Monroe County, Ga.



Satisfaction/closure/vengeance

Wearing a firefighter jacket and a cathartic smile, the mother of a 7-year-old who was raped and murdered got some measure of payback by helping local smoke-eaters burn down the Florida home of the man now serving a life sentence for the crime.

Cases, Files

- What is the role of an attorney in a criminal case, appointed for a defendant who cannot afford counsel?

- *Powell* v. *Alabama*, 287 U. S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932) ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence").

"6th Amendment: the accused shall . . . have the Assistance of Counsel for his defence"

The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

Strickland v. Washington, 466 U.S. 668, 685 (U.S. 1984)

- That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

- This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

- The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies [**2065] instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See *Michel v. Louisiana*, 350 U.S. 91, 100-101 [***694] (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

1955

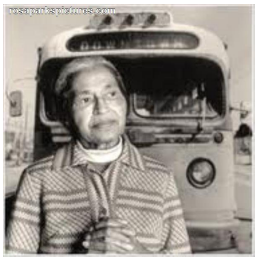
Prevailing norms of practice as reflected in American Bar Association standards and the like, e. g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable

Strickland v. Washington, 466 U.S. 668, 688 (U.S. 1984)

1955 Technology

1955 Laws

- Segregated all services for the public by race
- Interacial conception was a felony
- Insane asylums segregated
- Co-habitation with person of another race was a felony
- December 1, 1955 – Rosa Parks on the bus
- Jim Crow laws "separate but equal" – Plessey v Fersuson, 1896



February 2015 ABA Standards

- http://lalegalethics.org/wp-content/uploads/107d.pdf

Standard 4-3.7 Prompt and Thorough Actions to Protect the Client

- Defense counsel should inform the client of his or her rights in the criminal process at the earliest opportunity, and timely plan and take necessary actions to vindicate such rights within the scope of the representation.
- Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy.

Standard 4-3.9 Duty to Keep Client Informed and Advised

- (a) Defense counsel should keep the client reasonably and currently informed about

developments in and the progress of the lawyer's services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

- it is a settled professional standard that a "prosecutor should not make arguments calculated to appeal to the prejudices of the jury." ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3-5.8(c), p. 106 (3d ed. 1993). **Calhoun v. United States, 133 S. Ct. 1136, 1137 (U.S. 2013)**

- The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. . .

ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d ed. 1999).

Padilla v. Kentucky, 559 U.S. 356, 367 (U.S. 2010)

- Although the Due Process Clause of the Fourteenth Amendment, as interpreted by Brady, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. See Kyles, 514 U.S., at 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 ("[T]he rule in Bagley (and, hence, in Brady) requires less of the prosecution than the ABA Standards for Criminal Justice . . . . See . . . Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993)"

Cone v. Bell, 556 U.S. 449, 470 (U.S. 2009)

- Giving the attorney control of trial management matters is a practical necessity. "The adversary process could not function effectively if every tactical decision required client approval." Taylor v. Illinois, 484 U.S. 400, 418, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The presentation of a criminal defense can be a mystifying process even for well-informed laypersons. This is one of the reasons for the [***625] right to counsel. See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932); ABA Standards for Criminal Justice, Defense Function 4-5.2, Commentary, p 202 (3d ed. 1993)

Gonzalez v. United States, 553 U.S. 242, 249 (U.S. 2008)

- "[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'" Wiggins v. Smith, 539 U.S., at 524, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (quoting Strickland v. Washington, 466 U.S., at 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052), and the Commonwealth has come up with no reason to think [***376] the quoted standard impertinent here. n7

Rompilla v. Beard, 545 U.S. 374, 387 (U.S. 2005)

Capital Standards Too

- Our decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines. 539 U.S., at 524, 156 L. Ed. 2d 471, 123 S. Ct. 2527 ("The ABA Guidelines provide that [HN10] investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor'" (quoting 1989 ABA Guideline 11.4.1.C; emphasis in original)).

Counsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989. As Schlaich acknowledged, standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report. App. 488. Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. Id., at 487. Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American [**2537] Bar Association (ABA)--standards to which we long have referred as "guides to determining what is reasonable." Strickland, supra, at 688, 80 L Ed 2d 674, 104 S Ct 2052; Williams v. Taylor, supra, at 396, 146 L Ed 2d 389, 120 S Ct 1495.

Wiggins v. Smith, 539 U.S. 510, 524 (U.S. 2003)

Touro Law Review, Vol 19, 2004

Active listening is a position in which the lawyer, at least in the beginning of a case, is trying to learn about the client and what kind of work alliance you need to build. It enables you to sit back at arm's length and listen not only to what the client says, but to what is behind what the client says and what is behind what the client doesn't say. That enables you to sit back and ask yourself, "what are this person's real motivations here," not "what they are telling me," because they may not know either. "What are their expectations for us; how close or far are those from realities; do they match who I am as a lawyer?" That is the way you can listen. P864

Touro

Two of the basic functions, the most fundamental functions of lawyers, are to give advice and to inform. But, there are ways to do that to increase the probability that the client will take it in, namely things like not giving important advice or information when a client is most emotional. You bring them through conversation to a place of at least relative calm, and then you give advice that you need to give, and you do it slowly, repeatedly, and very concretely.

lawyers need to gtve themselves
permission to take care of themselves, to not be super people with
no needs. What the other helping professions have learned is that
you must take your own needs seriously to continue to have
anything to offer to your clients. As such, I would like to make
three suggestions along those lines.

One, if you believe that vicarious traumatization may explain your situation, do some detective work. See what parts of your daily life are suffering. Start with the basic things.

[Physical and mental health. . . Entertainment, relaxation, exercise . .]

Developing the support of other people in your situation, of bar associations, or people you might meet at events like these, and

making sure that your own personal community is a supportive, healthy one is a high priority for your clients. Your clients need

you to do this for them and for you.

The third thing is your sense of meaning. Many of you started doing this work because you wanted to help people in trouble and because you believed you had something hopeful and constructive to offer. You must maintain that sense of hope and meaning in order to continue to have something to offer to your clients. I think much of this comes down to reaffirming the meaning of the most basic values that have brought you to this work in the first place and have given you the resources that you have to offer.

19 Touro L. Rev. 873 2002-2004 STRESS, BURNOUT, VICARIOUS TRAUMA

"Compassionate lawyering for social justice requires care and nurture of the lawyer, as well as the client, and this self-care is our ethical duty." Prof Jean Koh Peters, Yale Law School

Prof Peters – research on Trauma

I realized it was not permission, it was a duty that we had, an ethical duty that we had to attend to the ways in which trauma and vicarious trauma disrupt ourselves and to repair that on a regular basis. Without that kind of careful, ongoing care of ourselves and of the things that give us meaning, we would eventually have nothing to give our clients and no resources through which to render service.